2008

The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction

Julie R. O'Sullivan
Georgetown University Law Center, osullij1@law.georgetown.edu

44 Am. Crim. L. Rev. 1447-1479 (2007)

July 2008

The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction

44 Am. Crim. L. Rev. 1447-1479 (2007)

Julie Rose O'Sullivan
Professor of Law
Georgetown University Law Center
osullij1@law.georgetown.edu

VOLUME 44 FALL 2007 NUMBER 4

AMERICAN CRIMINAL LAW REVIEW

THE DOJ RISKS KILLING THE GOLDEN GOOSE THROUGH COMPUTER ASSOCIATES/SINGLETON THEORIES OF OBSTRUCTION

Julie Rose O'Sullivan

Published by
the Georgetown University Law Center

THE DOJ RISKS KILLING THE GOLDEN GOOSE THROUGH COMPUTER ASSOCIATES/SINGLETON THEORIES OF OBSTRUCTION

Julie Rose O'Sullivan*

The corporate defense bar has long resisted the U.S. Department of Justice's (DOJ's) policy with respect to corporate cooperation[1] on a number of grounds. By far the loudest, and most sustained, objection has been to DOJ prosecutors' (allegedly) routine insistence that corporations waive the protections of the attorney-client privilege and the work product doctrine. These "compelled-voluntary" waivers[2] are, or so the defense argues, virtually a precondition to securing credit for full cooperation and thus, perhaps, a declination of criminal charges against the corporation or other valuable regulatory or sentencing considerations. The defense bar charges that the DOJ's cooperation and, in particular, its waiver policies mean the death of adversary justice for corporations and convert defense counsel into junior G-men.[3]

With respect to the first charge, practitioners seem to be objecting to the pervasive presuppositions underlying the DOJ's policy, as well as the policies of a wide array of federal regulators: that corporations have a duty *not visited upon individuals* to self-report potential wrongdoing within the company, to cooperate fully with government investigators, to remedy any damage, and to act aggressively to prevent recurrence of the objectionable behavior. The assumption that corporations should engage in a "crime-fighting partnership" with the government—even if it means criminal prosecution and hefty penalties—is a constant. The second theme resonating throughout the literature flows from the first. The bar argues virtually with one voice that the waiver policy

---

* Julie Rose O'Sullivan is a professor of law at Georgetown University Law Center. She would like to thank everyone who commented on this paper and, in particular, Jack Cooney, Denis McInerney, and Vassili Thomadakis for inspiring her interest in these cases as well as for their invaluable insights. All opinions expressed, and mistakes and misjudgments made, are, of course, her own.

1. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations, at III.A.4 (2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/mcnulty_memo.pdf [hereinafter *McNulty Memo*].

2. Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 900-02 (2006) ("[T]he escalating pressure to waive these protections is eroding the desired atmosphere of mutual candor and trust that has traditionally been the hallmark of the attorney-client relationship.").

3. When defense lawyers explain their outrage in more specific terms, they rely upon the allegedly adverse affect that waivers will have on the rationales underpinning the privilege: that is, "compelled-voluntary" waivers undermine corporations' incentives competently to investigate alleged wrongdoing and create impediments to the free flow of information between corporate counsel and the entity's various constituencies. I have, in other writings, expressed serious doubt about the viability of this argument. *See, e.g.*, Julie Rose O'Sullivan, *Does the DOJ's Compelled-Voluntary Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege or the Work Product Doctrine? A Preliminary "No"*, 60 STAN. L. REV. (forthcoming 2007).

essentially "deputizes" corporate counsel in furtherance of this "crime-fighting partnership" between corporate America and the government.

The sponsors of this symposium have wisely encouraged contributors to be brief, so I will not assay a lengthy explanation of the dynamics of corporate internal investigations or the effects of the DOJ policy on that dynamic. Suffice it to say that a variety of circumstances conspire to make it virtually impossible for many or even most public companies to fail to investigate allegations of wrongdoing *and* to cooperate with the government by sharing at least some of corporate counsel's investigative findings.[4] And it is true that the pressures that bring many corporations to heel at the first hint of government concern have also changed corporate counsel's role in fundamental respects, although perhaps not as completely as some suggest. If the corporation decides to cooperate, it must cooperate "fully" by government lights; to appear to cooperate but resist in reality simply invites the government to hammer the company for obstruction as well as whatever underlying criminal activity may be uncovered. Thus counsel, in serving the interests of his "cooperating" client (the entity), must investigate fully, fairly, and without shielding any particular corporate constituency. Counsel's job is to lay his client bare before the prosecutor, hoping that the prosecutor, in return, will do the "right" thing and pass on a criminal prosecution. The object of this essay is not to explore the wisdom of this transformation of corporate defense counsel from zealous advocates to junior G-men. My less ambitious aim is to point out that the DOJ—the architect of this transformation—seems to have either ignored the implications of its "deputization" of corporate counsel, or hopes that courts in future will do so.

The DOJ's cooperation policy is designed to maximize the extent to which the government can piggyback on private counsel's work. Viewed from the government's perspective, this is a wise policy. The two primary categories of evidence upon which both the defense and the government will focus in trying to determine whether a crime was committed, and by whom, are corporate records and witness statements. Corporate counsel's work provides federal prosecutors with an invaluable leg up, first, in identifying the relevant hard evidence amidst a mountain of paper and millions of computer files and emails. For example, in the Computer Associates International, Inc. (CA) cases (*Computer Associates*) discussed within, it was reported that counsel undertook "a piecemeal search through hundreds of employee computers, many of which had e-mails that were overwritten. Technical experts . . . used a computer-disk imaging technique to resurrect many files. Several dozen forensic accountants and attorneys then embarked on the arduous task of reading through all of them."[5]

---

4. *See, e.g., id., passim.*

5. Charles Forelle & Joann S. Lublin, *In CA Probe: Recovered E-Mails, Surprise Cache of Documents*, WALL ST. J., Sept. 24, 2004, at A1.

Could the government replicate this work? Probably, but, at least at the beginning of an investigation, when the government, as in *Computer Associates*, may have strong suspicions but may lack the evidence to make a case, the commitment of the resources necessary to do so requires an expensive leap of faith. And the government—as seemingly massive as it is—simply cannot afford to devote the dollars and manpower to an effort such as that undertaken in the *Computer Associates* internal investigation only to come up empty or with a borderline case. To illustrate, the U.S. Attorney's Office in the Southern District of New York, which has jurisdiction over Manhattan and thus Wall Street, has approximately fifteen to twenty prosecutors in its securities division; should the office commit the manpower to undertake a search of the magnitude described above, it is a certainty that other pressing investigations will go begging.

Second, company lawyers will be better able *quickly* to identify the relevant witnesses—before evidence disappears, statutes of limitations run, or memories fade—in a corporate hierarchy that may be less than transparent to outsiders. Finding and talking to possible witnesses may also require the commitment of significant time, as well as additional resources. Thus, for example, in the Supreme Court's leading case on the applicability of the attorney-client privilege and work product doctrine in the context of corporate internal investigations, *Upjohn Co. v. United States*, counsel sent out questionnaires to employees around the world seeking information regarding "questionable payments" made to foreign public officials to obtain business, and then interviewed at least eighty-six employees, some of whom were foreign nationals residing abroad and thus beyond the reach of U.S. grand jury subpoenas.[6] In *Computer Associates*, counsel or their agents interviewed more than 100 people. Corporate counsel may also be able to obtain the statements and assess the credibility of employees who are unavailable to the government, whether because they ultimately decide, as the investigation unfolds and their exposure becomes clearer, to claim their Fifth Amendment when approached by prosecutors or because they are beyond the federal courts' compulsory process.

Corporate counsel's advantages do not end with access to records and witnesses. The corporation's lawyers are better positioned to learn the structure, history, culture, and business of their client, as well as the character and background of individual employees. Accordingly, they can provide invaluable context for the facts developed. Critically, corporate counsel can gather the facts, and evaluate the legal significance of those facts, much more expeditiously than can government investigators, allowing those investigators to further leverage their limited resources. It is also notable that at least some of counsel's advantages with respect to obtaining evidence derive from their capacity as *private* actors. Most obviously, for example, corporations can threaten employees with seriously adverse employ-

6. 449 U.S. 383, 386 (1981).

ment consequences should they refuse to cooperate in the government inquiry, something that state actors cannot do without creating Fifth Amendment problems.[7]

The "partnership" that the DOJ's cooperation policy demands of corporations is obviously extremely valuable to the government. But the DOJ threatens to kill its own golden goose by bringing a spate of high-profile prosecutions of corporate executives for obstruction of an "official proceeding" (i.e., a regulatory and/or criminal investigation) premised on their *lies to the corporation's own counsel.* In Parts I and II within, these cases—involving executives at CA, Sanjay Kumar and Stephen Richards, and an energy trader employed by El Paso Corporation, Greg Singleton—are discussed at length.

To summarize, the key legal issue in these cases for our purposes is whether false statements made to counsel bear the requisite causal connection or, in the Supreme Court's terminology, "nexus," to an official proceeding because, after all, these are *obstruction* cases, not simple false statements cases. Federal prosecutors argued in defending these prosecutions that there was an obvious "nexus" between the executives' lies to corporate counsel and the official proceedings (grand jury and the Securities and Exchange Commission (SEC) investigations) at issue because the defendants knew (*Computer Associates*) or believed (*Singleton*) that the corporation was cooperating (*Computer Associates*) or might cooperate (*Singleton*) with the government and, in so doing, intended (*Computer Associates*) or at least contemplated (*Singleton*) that counsel would turn over the defendants' false or misleading statements to the grand jury and SEC. As the District Court in *Singleton* indicated, the proposed "nexus" was, in essence, the fact that private counsel were working as "an arm of the (government)"[8] while conducting their nominally private investigations on behalf of the entity. These prosecutions are perfectly consistent with the government's conception of the proper role of the corporation and corporate counsel when allegations of wrongdoing erupt, as outlined above. It is not the theory of prosecution that fits ill with the DOJ objectives reflected in the cooperation policy. Rather, it is the unintended consequences of these cases—on the conduct of the investigations and in court—that makes them counter-productive.

As is discussed in Part III, these obstruction prosecutions threaten to put a stopper in the information flow that is the object of the cooperation policy by changing corporate counsel's conduct of internal investigations and, consequently, the likelihood that employees will share, freely, fulsomely, and candidly, what they know or suspect with counsel. For example, many white-collar lawyers are considering whether they should advise employees, at the inception of an interview, that the employees may be exposed to possible obstruction charges if their

7. *See infra* notes 101-105 and accompanying text.

8. United States v. Singleton, No. H-06-080, 2006 WL 1984467, at *6 (S.D. Tex. July 14, 2006).

statements are not truthful. Other lawyers have responded to these prosecutions by suggesting that employees have separate counsel at the very beginning of an investigation. Either way, the bar recognizes that these approaches may well put a significant damper on employees' willingness to talk to corporate counsel and thus on counsel's ability to share with the government the information it needs and wants.

A second type of fall-out threatened concerns the possibility that courts will take the government theory to heart and decide that if corporate lawyers are indeed acting as "arms of the government," they must abide by the same constitutional restraints that bind state actors. While arguing that there is a sufficient "nexus" between lies to counsel and the conduct of the official investigation for purposes of the obstruction statutes, the DOJ has, at the same time, resisted attempts to impute to it the actions corporations take to secure the benefits of the cooperation policy. These actions, prosecutors contend, lack a sufficient "nexus" to the government's investigation and thus cannot constitute "state action" for constitutional purposes. It is difficult to credit the government's contention that a "nexus" sufficient to secure up to twenty years in jail for obstruction is not a "nexus" for purposes of constraining government action. And if the actions of counsel are deemed "state action," the information they secure, for example by threatening employees who do not cooperate with the government with employment termination, may well be suppressed and thus unusable by the government.

It is possible that the DOJ simply did not focus on the implications of these prosecutions, or that the decisions made in the two cases were not coordinated.[9] That said, these were not aberrant, small-time indictments; they were brought in high-profile cases involving some of the biggest firms in the white-collar defense business and seemed to be designed to get the attention of corporations and their lawyers. Indeed, there could hardly be a better way of getting the attention of the white-collar bar than cases such as these which, if taken to trial, promise the specter of well-known white-collar lawyers being called as *the* star witnesses against former executives of their clients. The statute selected was chosen very consciously to avoid, if possible, any need to prove a causal "nexus" between lying to private counsel and the compromising of an "official proceeding," perhaps indicating sensitivity to the "state action" case law. Finally, the DOJ chose to go after these defendants hammer and tongs, using a new and—in comparison to the usual charges brought in analogous circumstances—extremely punitive statute.

One can distinguish between the *Computer Associates* and *Singleton* cases in

9. Throughout this essay I speculate on the decision-making processes of the DOJ generally and the prosecutors in these cases in particular. Similarly, I make some assumptions about what was going on in the defense camp. Because I was not privy to the decision-making of either the government or the defense, I should emphasize that my theories regarding what went into these decisions are in fact pure guesses, although I would like to think that they are *informed* guesses. Should those involved in the decision-making in these cases wish to correct my suppositions where I have gone astray, I would be most grateful.

terms of the strength of the obstruction theory and the threat posed to the defense bar by these prosecutions. But the defense bar, as I understand it, has not accepted this distinction. The message received by white-collar corporate defenders is that the government is using a twenty-year count to charge persons who lie to corporate counsel in the course of internal investigations. Should the DOJ continue to bring these cases in future, it risks a great deal: the obstruction prosecutions may well threaten the invaluable pipeline of information it seeks to secure through its cooperation, and controversial waiver, policies. Ultimately then, these cases threaten to defeat the entire purpose of the DOJ's "crime-fighting partnership" with corporate America—that is, securing, in a quick and efficient way, the information needed to resolve corporate crime cases and bring those individuals responsible to justice.

I. THE *COMPUTER ASSOCIATES* CASES

A. The Facts

Beginning in 2002, CA, one of the largest providers of computer software for business applications in the world, came under the scrutiny of the U.S. Attorney's Office in the Eastern District of New York, the Federal Bureau of Investigation (FBI), a federal grand jury, and the SEC, because of allegations that the company engaged in improper accounting practices. At the end of the day, the government secured the guilty pleas of much of CA's senior management in connection with the accounting fraud: CA's Chief Executive Officer, Sanjay Kumar; Head of Worldwide Sales, Stephen Richards; Chief Financial Officer, Ira H. Zar; General Counsel and Senior Vice President, Steve Woghin; Senior Vice President of Finance and Administration, David Kaplan; and Vice President of Finance, David Rivard.[10]

Although the government initially investigated five allegedly questionable financial practices, it ultimately honed in on one: CA's practice of using a "35-day" month so that deals concluded, for example, five days after the end of one quarter could be included in that quarter's revenue numbers. It was alleged that this practice, denied until the end by CA's executives, was instituted to meet the financial projections of Wall Street analysts. The executives allegedly feared, with good reason, that failing to meet analysts' projections would result in the CA stock price taking a hit.[11] This practice was alleged to have extended through all four

---

10. Robert G. Morvillo & Robert J. Anello, *Beyond 'Upjohn': Necessary Warnings in Internal Investigations*, 234 N.Y. L.J. (Oct. 4, 2005); *Three Plead Guilty in Computer Associates Case*, NYT.com (Apr. 9, 2004).

11. For example, the Stipulation of Facts attached as an exhibit to the Deferred Prosecution Agreement (DPA) that CA entered into with the government, noted that in July 2000, CA issued a press release reporting that its financial results for the first quarter would be less than Wall Street estimates, and CA's stock price dipped more than forty-three percent as a result. Deferred Prosecution Agreement at ex. C ¶ 6, United States v. Computer Associates Int'l, Inc., Cr. No. 04-837 (S.D.N.Y. Sept. 22, 2004), *available at* http://www.sec.gov/Archives/edgar/data/356028/000095012304011246/y02481exv10w1.htm). [hereinafter CA DPA].

quarters of 2000 (but not, apparently, thereafter).[12] Obviously if one is going to take, for example, $2 million in contracts from the first five days of the second quarter to burnish one's results in the first-quarter, and one is still concerned with meeting Wall Street's projections for the second-quarter, five days are going to have to come off the third-quarter, and so on. This practice was both unacceptable under GAAP and resulted in the filing of false financials with the SEC.[13] Accordingly, it was plainly wrong, the employment of those participating in it should have been terminated forthwith, civil penalties should have been vigorously enforced, and criminal prosecution of those responsible was not inappropriate.

It seems to me, however, based only on a reading of the indictment and without knowing more about the government's evidence, to have been a case that could be sympathetically presented to a jury by the defense. Granted, there was a great deal of money involved—by my estimate the indictment alleged that the total amount of money shifted from one quarter to another over the course of 2002 totaled $1.189 billion, out of a total revenue stream of $6.776 billion. But if the above practice was consistently followed, as alleged, what one had at the end of the day was one quarter with an extra five days and, thereafter, three quarters of the usual length defined in nontraditional, and undisclosed, terms (i.e., starting five days into the usual start of the quarter and ending five days after the normal ending date).

I am not an accounting or financial expert and thus may represent the usual juror when I say that the practice was wrong but also less than earth-shattering, at least when considered in light of the twelve-year sentence that Kumar received (to be fair, for both the fraud and the obstruction) *and* the possibility that a criminal case would have destroyed the company and the livelihood of its many employees. After all, the deals concluded five days into the next quarter were *real* deals and the revenues were *real*; from a defense perspective, they were simply put in the wrong column. And the government did not charge that the overall revenue figures reported for 2002 were materially inflated or incorrect. In short, for jurors who sometimes experience the "shorts" in the days prior to a paycheck, this might have been a "there but for the grace of God, go I" moment.

I am not arguing that this prosecution was wrong, only that the accounting case might have been a defensible one from the defense perspective. What converted this from a potentially triable case to one in which the company had to scramble for cooperation credit to secure a deferred prosecution agreement (DP) from the government was, as is so often the case, the CA executives' efforts to cover-up

---

12. *See, e.g., id.* ex. C ¶ 7. The indictments in the case, as well as the SEC filings, refer to the practice as having been used "[p]rior to and during CA's fiscal year 2000," but the subsequent civil and criminal charges lodged concern only fiscal year 2000. *Accord* Superseding Indictment ¶¶ 19-21, United States v. Kumar, Cr. No. 04-846 (S-2) (ILG) (E.D.N.Y. July 28, 2005), *available at* http://www.usdoj.gov/usao/nye/vw/PendingCases/Charges_filed_US_v_SANJAY_KUMAR_and_STEPHEN_RICHARDS.pdf. [hereinafter Kumar Indictment].

13. *See, e.g.*, CA DPA, *supra* note 11, at ex. C ¶ 7.

their "35-day month" practice and to persuade their lawyers, the CA Board, and ultimately the government that these allegations were baseless.[14]

According to the indictment of Sanjay Kumar and Stephen Richards, when CA learned of the government's concerns in early 2002, it promptly hired an outside law firm, Wachtell, Lipton, Rosen & Katz, to represent it in connection with these investigations. Through Wachtell, "CA represented to the United States Attorney's Office, the FBI and the SEC that it was committed to cooperating fully with the Government Investigations. This representation was also made publicly by CA in press releases, SEC filings and other public statements."[15] Reading between the lines of media reports on the case, it appears that CA management persuaded the Board that, because the government had narrowed its focus from five accounting practices to one, "there wasn't much to the other allegations, and that the backdating suspicion also soon would be discredited."[16] Whether the Board, in reaction, gave Wachtell a limited charge or for other reasons, such as the involvement of CA's General Counsel in the cover-up, the Wachtell investigators did not access what later turned out to be voluminous inculpatory email records, and they accepted executives' assertions that the records that the government sought did not exist.

Prosecutors, who had access to CA's customers' back-dated documentation of deals concluded with CA, expressed to the CA Board its "extreme disappointment" about the company's failure to produce the relevant records.[17] In response, the Audit Committee of Computer Associates' Board hired a second law firm, Sullivan & Cromwell LLP, in July 2003, to conduct an internal investigation into the contested accounting practices. Sullivan & Cromwell then engaged in the extensive search mentioned above for computer records and General Counsel Woghin finally turned over to the Sullivan & Cromwell team twenty-three boxes of records, among them the "non-existent" records long sought by the government.[18]

The government eventually allowed CA to resolve the case with a DP rather than an indictment—a decision, one would guess, that was attributable in major part to the diligence with which Sullivan & Cromwell undertook to respond to the

---

14. In a Deferred Prosecution Agreement dated September 22, 2004, CA acknowledged that it had engaged (through its employees) in securities fraud (15 U.S.C. § 78j(b)) and obstruction of justice (18 U.S.C. §1512(c)(2)). In return for the remedial actions CA had taken, "CA's continuing commitment to full cooperation with" the government, and CA's agreement to pay restitution, undertake specified corporate reforms, and retain an independent examiner, the government agreed to recommend deferral of CA's prosecution for eighteen months. If CA was in full compliance with the agreement at the end of the deferral term, the government agreed to seek dismissal with prejudice of the criminal information filed against CA. Subsequently, CA also consented to the entry of judgment against it in the SEC's civil action, without admitting or denying the substantive allegations of wrongdoing outlined in the SEC's complaint. CA DPA, *supra* note 11, ¶¶ 1-4.

15. CA DPA, *supra* note 11, ex. C ¶ 18; *see also* Kumar Indictment, *supra* note 12, ¶ 55.

16. Forelle & Lublin, *supra* note 5.

17. *Id.*

18. *Id.*

government's "requests."[19] According to the *Wall Street Journal*, for example, although Kumar continued to deny involvement in the questionable practice, prosecutors "pointedly told Computer Associates' lawyers and directors, in effect, that they weren't looking hard enough for evidence against" Kumar.[20] The government also "implied [that] the involvement of top executives in fraud and obstruction could result in an indictment of the company itself," which, CA officials feared, might result in "a sale or breakup of the company."[21] This meeting with the government reportedly led Sullivan & Cromwell's lead lawyer, Robert J. Giuffra Jr., "[t]o spur on the board's probe, [by] . . . promis[ing] a bottle of champagne to the first member of his team to find documentary evidence implicating Mr. Kumar in backdating sales contracts."[22]

In September 2004, the DOJ indicted Kumar and Richards, charging them with conspiracy to commit securities and wire fraud, securities fraud, making false SEC filings, conspiring to obstruct, and obstructing justice under 18 U.S.C § 1512(c)(2),[23] perjury (Richards), and false statements (Kumar).[24] The basis for the obstruction charge was, in part, that these executives repeatedly lied when interviewed by the

---

19. Indeed, the CA Deferred Prosecution Agreement explicitly states:

> In late-July 2003, CA through its Audit Committee, retained the law firm of Sullivan & Cromwell LLP ("S&C") to conduct an internal investigation into CA's accounting and financial practices. In December 2003, CA's internal investigation was expanded to include an inquiry into whether any of CA's officers and employees obstructed or failed to cooperate with the Grand Jury Investigation and the SEC Investigation. CA's internal investigation was conducted with the assistance of a forensic accounting team from PricewaterhouseCoopers ("PwC") and involved more than 100 interviews and the review of thousands of pages of documents and e-mails. CA has shared with the Investigative Entities the results of its internal investigation, including documents that might otherwise have been withheld under the attorney-client privilege and work-product doctrine. CA acknowledges and understands that its prior, ongoing and future cooperation are important and material factors underlying the Office's decision to enter into this Agreement, and, therefore, CA agrees to continue to cooperate fully and actively with the Investigative Entities and with any other agency of the government designated by the Office . . . regarding any matter about which CA has knowledge or information.

CA DPA, *supra* note 11, ¶ 5.

20. *See* Forelle & Lublin, *supra* note 5.

21. *Id.*

22. *Id.*

23. Section 1512(c) provides:

> Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title and imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(c) (2000 & Supp. 2005).

24. The first indictment, returned on September 20, 2004, was twice superseded. The final superseding indictment returned on June 28, 2005. Each version contained the obstruction count with which we are concerned. *See* Kumar Indictment, *supra* note 12.

company's outside law firms.

For example, Kumar's indictment charged that he met with Wachtell lawyers but "did not disclose, falsely denied, and otherwise concealed[,] . . . concocted and presented to [the outside law firm] an assortment of false justifications."[25] The indictment further alleged that Kumar "knew, and in fact intended, that the Company's Law Firm would present these false justifications to the United States Attorney's Office, the SEC and the FBI so as to obstruct and impede[] the Government Investigations."[26] Kumar was alleged to have repeatedly lied to and misled lawyers from Sullivan & Cromwell,[27] again with the knowledge and intent that his "false statements and concealment of material information would have the effect of obstructing and impeding the Government Investigations."[28] Lies to the corporation's lawyers did not constitute the whole of the obstructive conduct alleged, however. Thus, for example, Richards was also alleged to have testified falsely under oath before the SEC, and Kumar was alleged to have lied to FBI agents and others when interviewed at the U.S. Attorneys Office.[29]

B. The Law: 18 U.S.C. §§ 1503, 1512(b)(3), 1512(c)(2)

Kumar and Richards attacked the obstruction charges, *inter alia*, by raising an obvious question: how can lying to or misleading *the company's own private counsel* be deemed obstruction of an "*official proceeding*"?[30] A brief introduction to the maze that is the obstruction chapter of the U.S. Code is, regrettably, necessary to understand the government's charging choices and the basis of the defendants' objection. This will be painful—virtually any close examination of this overlapping, vague, and overbroad mess of statutes is[31]—but I beg the reader to bear with me, as this *is* relevant.

When a witness lies to federal agents that witness is usually prosecuted under the statute designed for that purpose, 18 U.S.C. § 1001. Sometimes, however, the government elects to pursue an obstruction charge in addition to, or instead of, the usual false statement count. Until recently, the federal obstruction provision most commonly charged in such cases was the "omnibus" clause in 18 U.S.C. § 1503.[32]

---

25. *Id.* ¶ 56.
26. *Id.*
27. *Id.* ¶ 66.
28. *Id.*
29. *Id.* ¶¶ 68-76.
30. *See, e.g.* Memorandum of Law in Support of Defendant Stephen Richards' Motion to Dismiss Counts Six and Seven of the Second Superseding Indictment at 20-25, United States v. Kumar, No. 04-846 (S-2) (ILG), (E.D.N.Y. Oct. 24, 2005) [hereinafter Motion to Dismiss].
31. For an even more painful journey, see Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 *passim* (2006).
32. The relevant portion of the statute reads as follows: "Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice" shall be punished, in the absence of aggravating circumstances such as killings, by up to ten years' imprisonment. 18 U.S.C. § 1503 (2000).

Section 1503, in brief, requires that the government prove that the defendant knew of a pending judicial proceeding and corruptly endeavored to obstruct the due administration of justice in that proceeding, with the specific intent to obstruct.

The Supreme Court attempted to draw a line between simple false statements (prosecutable under § 1001) and obstruction (under § 1503) in *United States v. Aguilar*.[33] Defendant Aguilar, a judge, was charged with obstruction under § 1503 based on the fact that he lied to a couple of FBI agents. To ensure that not every lie to a federal agent would become an obstruction case, the Court made clear the *intention* with which the defendant must act, and the *object* of that act: "The action taken by the accused must be *with an intent to influence judicial or grand jury proceedings*; it *is not enough that there be an intent to influence some ancillary proceeding*, such as an investigation independent of the court's or grand jury's authority."[34] To ensure that the harm that is the gravamen of obstruction is present where false statements are made to investigators *outside* a judicial proceeding, the Court fabricated a "nexus" requirement, under which the government must prove "that the [lies to investigating agents] must have a relationship in time, causation, or logic with the judicial proceedings."[35] In other words:

> [T]he endeavor must have the "natural and probable effect" of interfering with the due administration of justice. This is not to say that the defendant's action need be successful; an "endeavor" suffices. But . . . if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.[36]

The Court made clear that this "nexus" requirement, although it might reinforce the statute's intent requirement, was not a mens rea element, but rather a causation element.[37] The effect of this new element, then, is to eliminate from the reach of the statute corrupt acts *intended* to obstruct, but which "would only unnaturally

---

33. 515 U.S. 593 (1995).

34. *Id.* at 599 (emphasis added).

35. *Id.*

36. *Id.* (citations omitted).

37. *See id.* at 601. Thus, the Court made clear that a defendant could have a demonstrable specific intent to corruptly influence the due administration of justice, but if the causal "nexus" was missing, he could not be convicted under § 1503:

> Justice Scalia [in dissent] . . . apparently believes that *any* act, done with the intent to "obstruct . . . the due administration of justice," is sufficient to impose criminal liability. Under the dissent's theory, a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability.

Id. at 602 (emphasis in original).

and improbably be successful."[38]

After creating this "nexus" element, the Court applied it to void Aguilar's conviction. The government emphasized that Aguilar had asked the FBI agent to whom he lied, *inter alia*, whether he was the target of a grand jury investigation, to which the agent had responded: "[T]here is a Grand Jury meeting . . . Um some evidence will be heard I'm . . . sure on this issue."[39] The government contended that this exchange proved all it needed to secure a conviction: i.e., that Aguilar knew of the pending grand jury proceeding. The Court ruled, however, that this exchange was not sufficient to "enable a rational trier of fact to conclude that [Aguilar] *knew that his false statement would be provided to the grand jury*."[40] The Court deemed the possibility that the investigating agent, who had not been subpoenaed or otherwise directed to appear before the grand jury, would provide Aguilar's false statements to that body "speculative."[41] Accordingly, the Court held that "it cannot be said [that Aguilar's false statements would] have the 'natural and probable effect' of interfering with the due administration of justice."[42]

Likely in response (at least in part) to the added proof requirements imposed in *Aguilar*, federal prosecutors have increasingly turned to another obstruction statute, 18 U.S.C. § 1512, to pursue false statements made during the course of investigations but outside formal proceedings. Section 1512 is very different from § 1503 in its purpose, structure, and elements. It is principally a witness tampering statute—that is, until recently, it was only applicable where the defendant misled, threatened, or corruptly persuaded *others* to do his dirty work, for example, by destroying documents or lying before a grand jury.[43] Until 2002, § 1512 did not apply where the defendant *himself* performed the obstructive acts; such personal acts of obstruction were generally dealt with under other statutes, such as § 1503 or its kissing cousin, § 1505, applicable in agency or congressional investigations. Section 1512 is also broader in scope than § 1503, which applies only to obstruction in the course of judicial proceedings.[44] Section 1512, by contrast, can be invoked in any "official proceeding," which includes not only judicial proceedings such as grand jury investigations, but also congressional and agency (SEC) investigations.

Most critical for our purposes is the fact that Congress decreed that under § 1512, unlike § 1503, "an official proceeding need not be pending or about to be instituted at the time of the offense."[45] Accordingly, a number of circuits to address

38. *Id.* at 612 (Scalia, J., dissenting).
39. United States v. Aguilar, 515 U.S. 593, 600 (1995).
40. *Id.* at 601 (emphasis added).
41. *Id.*
42. *Id.*
43. 18 U.S.C. § 1512(c) (2000 & Supp. 2005).
44. 18 U.S.C. § 1503 (2000).
45. 18 U.S.C. § 1512(f)(1) (2000).

the question held that the *Aguilar* "nexus" requirement did not apply in § 1512 prosecutions in part because it would be difficult to imagine how one would demonstrate a "nexus" or causal connection between a defendant's obstructive activity and a non-existent official proceeding.[46]

An apt candidate for use in *Computer Associates* and *Singleton* would have been § 1512(b)(3), which authorizes conviction where the defendant committed the obstructive conduct with the intent to "hinder, delay, or prevent" communication to a federal law enforcement officer or judge of information relating to the commission or *possible* commission of a federal crime.[47] Alone among the prohibitions of § 1512, this subsection makes no reference to an "official proceeding." And the DOJ has used this subsection where the defendants lie to intermediaries, whom the defendants hope will pass on the information to federal officials.

For example, in *United States v. Veal*,[48] police officers were convicted under § 1512(b)(3) for lying to *state* investigators in an effort to thwart an investigation into the death of a suspect in their custody under the theory that those investigators *might* turn the information over to federal agents, even though a federal investigation was not at that time pending. The officers appealed their conviction, arguing that their § 1512(b)(3) convictions "[could not] stand, not only because their false and misleading information was not directly communicated to federal agents, but also because there was no existing or imminent *federal* investigation of a crime of which they had specific knowledge and intended to hinder at the time that their subject actions occurred."[49] The Eleventh Circuit rejected the defendants' claims, in language that might have been tailor-made for the conduct of the *Computer Associates* defendants:

> Seeking to foster the communication of truthful, non-misleading information to federal authorities regarding a possible federal crime is the important federal interest that § 1512(b)(3) effectuates. Consequently, the specifically stated federal nexus in § 1512(b)(3), and not the *Aguilar* interpretation of the federal nexus in § 1503, controls our analysis . . . .

---

46. *See, e.g.*, United States v. Veal, 153 F.3d 1233, 1250-52 (11th Cir. 1998) (referring to § 1512(b)(3)); United States v. Gabriel, 125 F.3d 89, 103-05 (2d Cir. 1997) (referring to § 1512(b)(1)).

47. Section 1512(b)(3) provides in relevant part:

> (b) Whoever, knowingly uses intimidation, threatens, corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> . . . .
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. §1512(b)(3) (2000).

48. 153 F.3d 1233 (11th Cir. 1998).

49. *Id.* at 1248 (emphasis in original).

> . . . For violation of § 1512(b)(3), it is sufficient if the misleading information is *likely* to be transferred to a federal agent. All that was required for [the defendants'] violation of § 1512(b)(3) was the *possibility* or *likelihood* that their false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators.
>
> . . . .
>
> . . . It is irrelevant . . . whether the person who provides false or misleading information that ultimately becomes relevant to a federal investigation *intended* that a federal investigator receive that information; it is relevant only that the federal investigator or judge *received* it.[50]

Instead of relying on this subsection in *Computer Associates* and *Singleton*,[51] however, the DOJ elected to charge the *new* prosecutor's darling, the omnibus clause of § 1512(c).[52]

In 2002, Congress amended § 1512 to add §1512(c)(2) in response to the wholesale document destruction by Enron Corporation's auditor, Arthur Andersen LLP, after Enron's financial shenanigans became public. Section 1512(c), alone among the witness tampering provisions of § 1512, purports to address instances in which the defendant *himself* performs the corrupt acts instead of where the defendant acts on *others* to further his obstructive plan.[53] Congress decided to insert this seemingly anomalous section into the statute in response to DOJ complaints that in the *Andersen* case it was required to charge Andersen with corruptly persuading *others* (i.e., its own employees) to destroy documents, when it should have been able to charge Andersen *itself* with performing (through its employees) the dirty deed.

At least when read independently of the rest of the statute,[54] this subsection seems largely to replicate the omnibus prohibition of § 1503. However, § 1512(c)(2) is more attractive to prosecutors than § 1503—or for that matter § 1512(b)(3)—because the maximum penalty for a violation of this provision is twenty years' imprisonment,[55] *twice* the sentence authorized under either § 1503 or § 1512(b)(3).[56]

---

50. *Id.* at 1251-52 (footnotes and citations omitted) (emphasis in original).

51. For a discussion of *Singleton*, see *infra* Section II.

52. *See* Kumar Indictment, *supra* note 12; Indictment, United States v. Singleton, No. H-06-080, 2006 WL 3326639 (S.D. Tex. Mar. 8, 2006) [hereinafter Singleton Indictment].

53. *See* 18 U.S.C. § 1512(c) (2000).

54. Although not pertinent to this article, it is worth noting that in both the *Singleton* and the *Computer Associates* motions to dismiss, the defense argued at great length that § 1512(c)(2) had to be read in light of the legislative history and statutory context (i.e., its placement immediately after § 1512(c)(1), reproduced *supra* note 23). If read in this narrowing context, they argued, § 1512(c)(2) charges have to relate in some way to the destruction of tangible evidence, and cannot be applied in cases where all that is at issue are false statements to investigators.

55. 18 U.S.C. § 1512(c) (2000).

56. 18 U.S.C. §§ 1503(b)(3), 1512(b) (2000).

C. Applying the Law to the Facts: Assessing the Government's Charging Choices

All of this should provide some context for assessing the questions: why is the government so eager to bring obstruction charges in cases such as these, where one could argue that the underlying substantive counts of fraud and the like are quite sufficient; why are prosecutors choosing to charge § 1512(c)(2) instead of its old standbys?

I would guess that the DOJ is pressing for obstruction charges in these financial crimes cases for two principal reasons—one case-specific and one more general. Presumably, each individual prosecution was approved out of a need particular to the specific case. The obstruction charges may have been thought helpful in ensuring the admission of evidence that the defendant lied about material facts, thus demonstrating his consciousness of guilt. Charging the conduct, even if not necessary to secure admission of this proof under the Rules of Evidence, certainly would highlight it for the jury's consideration. "Consciousness of guilt" evidence is critical where the case is highly technical or the financial jiggering alleged might seem less than earth-shattering. Jurors may not follow testimony regarding the ins-and-outs of complex corporate accounting or feel confident in assessing the materiality of the misconduct alleged. But if the prosecutor proves that the defendant, when asked about the allegedly fraudulent accounting, *lied to his employer's own lawyers*—well, jurors will *definitely* "get" that. Such proof strongly suggests that the defendant, at least, believed his conduct to be questionable. Especially where what is contested is mens rea (that is, what did the defendant know or intend in adopting a particular accounting practice), this suggestion can be critical to support the inference that the defendant lied, to representatives of his own company, because he *knew* that what he had done was wrong.

I presume that the more general reason that the DOJ is bringing these cases is that it wishes to send a message—even if that message is one that I theorize[57] is ultimately counterproductive in light of the government's greater interest. It is putting out the word that lies to the government's corporate "deputies" will be viewed as seriously as lies to government investigators. In this, the DOJ's message is entirely consistent with the general tenor of its cooperation policy; it has so internalized its own belief in the "crime-fighting partnership" between government and corporate actors, and the concomitant role that corporate investigators play in effectuating that partnership, that these prosecutions make, as a conceptual matter, complete sense.

This general rationale for why the DOJ is pursuing these cases also goes a long way toward providing the answer to our second inquiry: why the government chose, among the overlapping code provisions available to it, to proceed under

57. *See infra* Section III.

§ 1512(c)(2). The DOJ was very strategic in choosing this section, and it appears that prosecutors' priorities were first to charge the count that carried the largest potential penalty, and second, if possible, to bring a charge that would not require proof of a "nexus."

During the oral argument on Kumar's and Richards' motion to dismiss the obstruction counts, the government acknowledged that it had charged § 1512(c)(2) in part because it was the government's belief that it did not need to prove an *Aguilar* "nexus" between the defendants' lies and the government's investigation under that statute.[58] It may have wished to avoid the necessity of proving a "nexus" because of concerns, ultimately realized in *Singleton*, regarding the weight of their proof on this element. Alternatively, the DOJ may have been concerned about the implications of a jury finding of a causal "nexus" for "state action" issues that might be raised on appeal. Because the Second Circuit's case law applying the *Aguilar* nexus standard is fairly stringent,[59] and because § 1512(b)(3) both seems more obviously apt and has been specifically held *not* to require proof of a "nexus,"[60] one has to wonder why the government chose to pursue its case under this new and untested statute. The only explanation I can posit is that this objective was subordinate to its principal aim: it chose § 1512(c)(2), rather than § 1512(b)(3) or § 1503, to bring to bear on these defendants a much, much bigger hammer—a statutory maximum of twenty years' imprisonment.[61]

---

58. *See* Transcript of Oral Argument at 41-45, 51-52, 68, 73, 74-75, United States v. Kumar, No. 04-CR-846, (E.D.N.Y. Dec. 21, 2005) [hereinafter Transcript]. The government also chose § 1512 in *Computer Associates* because of a peculiarity of Second Circuit law (not present in any other circuit) which states that when Congress removed the witness tampering prohibition formerly contained in § 1503 and created the new tampering statute, § 1512, it meant to remove witness tampering from the purview of § 1503. So, although other circuits permit the government to charge witness tampering (such as lying to investigators knowing that that they will report the lies in the "official proceeding") under either statute, in the Second Circuit prosecutors *must* charge tampering under § 1512. *See, e.g.*, United States v. Masterpol, 940 F.2d 760, 762 (2d Cir. 1991) ("In his view, if he was to be charged under 'Obstruction of Justice' chapter of Title 18, section 1501 through section 1517, he should have been charged under section 1512 or not at all. We agree."). At the oral argument on the CA executives' motion to dismiss the obstruction counts, the prosecutor argued that this case, in part, informed the government's decision to proceed under § 1512. *See, e.g.*, Transcript, *supra*, at 41-42. This helps to clarify why the government did not use § 1503 in *Computer Associates* (although not in *Singleton*), but it does not explain why the government chose § 1512(c)(2) instead of § 1512(b)(3).

59. *See, e.g.*, United States v. Bruno, 383 F.3d 65, 87-88 (2d Cir. 2004) (finding the nexus test was not satisfied where "the evidence established that this defendant's memo book had been subpoenaed (and) it did not establish that he knew that the allegedly false statements he had made to federal investigators would be conveyed to the federal grand jury"); United States v. Schwarz, 283 F.3d 76, 108-09. (2d Cir. 2002) (ruling a defendant must know his statements are being relayed to a grand jury for conviction).

60. *See* United States v. Veal, 153 F.3d 1233, 1250-52 (11th Cir. 1998); United States v. Gabriel, 125 F.3d 89, 103-05 (2nd Cir. 1997).

61. 18 U.S.C. § 1512(c) (providing for a maximum of twenty years' imprisonment). At least in *Computer Associates*, where the "official proceedings" allegedly obstructed included *both* a "judicial proceeding" (grand jury) *and* an SEC proceeding, one could argue that § 1512's broader application to all "official proceedings" was necessary. However, the government could have proceeded under § 1505, which is essentially § 1503's twin and applies in the context of agency proceedings and congressional investigations. *See* 18 U.S.C. § 1505 (2000 & Supp. 2005).

The DOJ's choice was not illegitimate, just interesting. It seems to demonstrate that the government elected to bring out the biggest of its guns, even if it was not the safest or most obviously appropriate charging option. The selection of the charges and the defendants strongly suggests that the government *wanted* corporate counsel and corporate America to take note of these indictments, and in this, at least, the DOJ has been very successful, to its ultimate detriment.

The government, having chosen to foreswear the safer path, saw some of that risk realized when, shortly after it indicted the Computer Associates executives, the Supreme Court handed down its decision in *Arthur Andersen LLP v. United States*.[62] In *Andersen*, a case charged under § 1512(b)(2), the Court, arguably in dicta, stated that the jury instructions in that case were faulty because they failed to require the jury to find any "nexus" between the obstructive activity alleged (corrupt persuasion to destroy documents) and any particular proceeding.[63] The Court acknowledged that under § 1512, unlike under § 1503, the government need not show that an official proceeding is pending or about to be instituted at the time of the offense.[64] Despite this critical difference in the statutory schemes, however, the Court rejected the government's argument that it made no sense to require a "nexus" where the statute itself dictated that there need be no incipient or existing investigation.[65] It simply adapted its *Aguilar* test to the circumstances by stating that a defendant charged under § 1512 must have at least "foreseen" or had "in contemplation" a "particular . . . proceeding" in which the documents sought to be destroyed might be material.[66]

Kumar and Richards leaned heavily on *Andersen* in arguing that the government had to prove an *Aguilar* "nexus." Further, they argued that there was an insufficient "nexus" between their allegedly deceptive statements to company counsel and an "official proceeding":

> *Aguilar* [and subsequent Second Circuit applications of that precedent] firmly establish that an obstruction prosecution may not be premised on mere denials of guilt (or any other lies) to federal law enforcement agents . . . because the requisite strong "nexus" to that proceeding demands a specific design and intention that those denials will be recounted in the official proceeding. Here, the "obstruct the lawyers" allegations of the indictment truly flout precedent, for [the defendants'] alleged denials of wrongdoing are one step *further removed* from the scenarios found legally inadequate (for lack of nexus) in *Aguilar* [and Second Circuit case law].[67]

The government, in response, attempted first to limit the *Andersen* ruling to the

---

62. 544 U.S. 696 (2005).
63. *Id.* at 707.
64. *Id.*
65. *Id.* at 707-708.
66. *Id.* at 708.
67. Motion to Dismiss, *supra* note 30, at 23-24.

particular subsection involved in that case, § 1512(b)(2), arguing for reasons that were not very well developed that the *Andersen* discussion should not apply in § 1512(c)(2) cases.[68] Second, the government argued that the legislative history underlying § 1512(c)(2) demonstrated a congressional intention to overrule the "nexus" requirement.

On the merits of the "nexus" question, the government pointed out that the defendants were conflating pleading with proof, and that the sufficiency of the evidence of nexus could not be tested on a pre-trial motion to dismiss. The government contended that the indictment alleged sufficient facts to satisfy any "nexus" requirement, explaining:

> Among other things, the Indictment states that when Kumar and Richards lied to CA's outside counsel, they *knew and intended* that such lies would be repeated to participants in the government investigations—both the grand jurors *and* the staff of the Securities and Exchange Commission, which was conducting an investigation parallel to the grand jury's.
>
> . . . .
>
> Moreover, the evidence at trial will establish facts beyond the specific allegations of the Indictment. The proof will demonstrate that, while claiming in SEC public filings to be "cooperating" with the government investigations, the defendants were in fact carrying out a coordinated effort to obstruct the grand jury and the SEC. Among other things, the proof will demonstrate that the defendants lied to CA's outside counsel because they *knew and believed that, pursuant to CA's purported efforts at cooperation*, outside counsel would present a factual report of the defendants' statements to the SEC and U.S. Attorney's Office.[69]

The government also emphasized, however, that additional acts of obstruction were alleged, including Richards' perjury before the SEC and Kumar's false statements to representatives of the U.S. Attorney's Office.[70] In its brief, and at oral argument, it then refused to be pinned down to an obstruction (and "nexus") theory that rested solely on the defendants' lies to corporate counsel.[71]

---

68. Government's Memorandum of Law in Opposition to Defendants' Pre-Trial Motions to Dismiss Counts One, Six, and Seven at 20-22, United States v. Kumar, No. 04-846 (S-2) (ILG), (E.D.N.Y. Nov. 21, 2005) [hereinafter Government's Opposition]. I cannot resist noting here that, had the government not had its heart set on the twenty–year statutory maximum offered by § 1512(c)(2), it could have made a much more persuasive argument that the *Andersen* "nexus" discussion is inapplicable in § 1512(b)(3) cases because of the fact that, alone among the subsections of § 1512, 1512(c)(3) does not require that the obstructive activity be done in the context of an "official proceeding."

69. Government's Opposition, *supra* note 68, at 20-21 (emphasis added).

70. *See id.*

71. *See id.*; *see also* Transcript, *supra* note 58, at 72-73. Richards' defense counsel, Mr. Gunther, and the prosecutor, Mr. Komitee, had the following exchange during oral argument:

> Mr. Gunther: I am not clear whether it is the Governments [*sic*] position that Mr. Richards [*sic*] alleged lies or concealment from Wachtell or Sullivan and Cromwell standing alone given the understanding of whether, of his motivation in speaking to the intermediary, the lawyers,

The district court did not resolve, or even mention, the question whether § 1512(c)(2) required proof of an *Aguilar* "nexus" in denying the defendants' motion to dismiss. Rather, the court simply ruled that the allegations in the indictment, if proved, would satisfy a "nexus" requirement.[72] More importantly, the court did not address at all the question of whether, or in what circumstances, lying to or misleading corporate counsel could be deemed actionable obstruction. In responding to the defendants' claims of a lack of the requisite "nexus," the court pointed only to the allegations that Richards knowingly lied and concealed information during his testimony before the SEC and that Kumar made false statements in an interview at the U.S. Attorneys Office.[73] And the court relied solely on the allegations relating to the causal connection between the defendants' face-to-face lies to government agents and in the SEC's "official proceeding" to rule that the indictment was sufficient to proceed to trial. In short, the court did *not* hold that the defendants could be convicted under § 1512 for lies to corporate counsel alone. The district court had the final word because, in April 2006, the defendants pleaded guilty to the indictment. Kumar was sentenced to twelve years in prison and Richards was sentenced to seven years in prison, for both the securities fraud and the obstruction charges.[74]

The *Computer Associates* prosecution, when examined closely, leaves us with an equivocal precedent. Kumar and Richards *did* eventually plead guilty to obstruction, so the government could be said to have prevailed on its theory. And the company's DP acknowledged the entity's responsibility for the obstructive conduct of its executives. But the government was not relying *solely* on the defendants' lies to corporate counsel in pursuing obstruction charges, and the district court did not even mention, let alone endorse, this theory in denying the defendants' motion to dismiss. In fact, after reviewing the entire indictment and the government's pre-trial submissions and arguments, it seems clear that the government viewed the executives' conduct as an intentional and very concerted conspiracy to mislead the government, only one part of which was the executives' deliberate use of Wachtell as a credible, innocent conduit for their misrepresenta-

---

> constituted a nexus under *Aguilar* and it is [*sic*] precedent . . . Is it the government's position that concealing something from Wachtell Lipton or Sullivan and Cromwell has a nexus to a grand jury proceeding or an SEC proceeding?
>
> Mr. Komitte: Our position on that is that whether something has a nexus to an official proceeding is a question of fact . . . We are standing before Your Honor saying if a nexus requirement is applied to the various means and manners of obstruction that we have alleged in the indictment, we will meet the nexus requirement, we will meet the burden of proof.

Id.

72. *See* United States v. Kumar, Cr. No. 04-846 (ILG), slip op. at 9 (E.D.N.Y. Feb. 21, 2006) ("The indictment plainly charges the defendants with conduct that bears a 'relationship in time, causation or logic' to an 'official proceeding' as that term is used in § 1512(c)(2) and defined in § 1515(a)(1)(C).").

73. *Id.* at 8-9.

74. Sentencing Results, United States v. Kumar, Cr. No. 04-846 (ILG) (S.D.N.Y. 2006), *available at* http://www.usdoj.gov/usao/nye/vw/PendingCases/US_v_SANJAY_KUMAR_and_STEPHEN_RICHARDS_Court_events.pdf.

tions. The charges in the case reflected not only the breadth and intentionality of this obstructive scheme, but also its success in stymieing the investigation for years. In short, this case seems to be *sui generis* in its facts, and is certainly, as we shall see, readily distinguishable from *Singleton*. But, as we shall also see, this does not appear to be the message that the defense bar (or the *Singleton* prosecutor) took from the *Computer Associates* precedent.

II. THE *SINGLETON* CASE

The second prosecution of interest also arose in the context of a high-profile government investigation. Greg Singleton, a vice president of and natural gas trader at El Paso Corporation, was charged, *inter alia*, with obstruction of justice under § 1512(c)(2) based on his alleged lies in the course of an internal investigation conducted by outside counsel for El Paso.[75] His case was one of the most important of over a dozen cases, pursued in San Francisco and Houston, against former natural gas traders alleged to have manipulated natural gas trading indexes, which the trading industry employed to value billions in gas contracts and derivatives.

The obstruction saga began when El Paso hired outside counsel to look into allegations, which were also being investigated by a federal grand jury, by the Commodities Futures Trading Commission (CFTC), and by the Federal Energy Regulatory Commission (FERC), that its traders had been misreporting gas trades to industry publications in order to manipulate the price of natural gas. With respect to the state of Singleton's knowledge at the time of his alleged false statements to corporate counsel, the indictment states the following: Singleton had been informed of the service of grand jury and CFTC subpoenas on the company; he was advised by the legal department that a meeting was scheduled to discuss "price reporting matters" which would be attended by outside counsel and which Singleton "[m]ust attend"; and he was sent, and responded to, a questionnaire from El Paso's legal department which stated that in "[preparing] for responding to [the CFTC] subpoena, we need . . . information from anyone who performed any trading function . . . or have had any communications with any energy industry trade publications."[76]

Outside counsel for El Paso requested an interview with Singleton and advised him, according to the indictment, "that El Paso may choose to disclose any information he gave them to 'other third parties, including government agencies.'"[77] This, of course, is the language of the standard *Upjohn* warning that corporate counsel, as a matter of course, gives to corporate agents at the inception

---

75. *See* Singleton Indictment, *supra* note 52, at 15-16. The indictment also charged Singleton with conspiring to communicate and communicating false reports concerning market information regarding the price of natural gas, *id.* at 7-14, and wire fraud, *id.* at 15-16.

76. *Id.* at 17-20.

77. *Id.* at 20.

of interviews.[78] Note that the usual *Upjohn* warning, just like the warning apparently delivered in Singleton's case, does *not* say that the results of the interview or the investigation *will* be turned over to the government, just that they *may* be shared with others.

Singleton was thereafter interviewed by outside counsel at his criminal defense attorney's office. The indictment alleges that, during the interview, Singleton "did not disclose, falsely denied, and otherwise concealed that he had provided false information to trade publications."[79] The indictment further alleged that Singleton "*believed* that El Paso's Outside Lawyers would inform government agencies of his statement during the interview."[80] Again, note that it was alleged that he "believed" his statement would be shared—*not* that he "knew" or "intended" that to be the case. The lawyers did eventually share with the government a memorandum reflecting what Singleton had said during the interview, but there was no allegation in the indictment that Singleton knew that the memo had been prepared, let alone that it had been shared with government investigators.[81]

What was *not* alleged in the indictment is perhaps more important than what was: there is no reference to a corporate decision (whether communicated to Singleton or not) by El Paso to cooperate with the government *or* waive applicable privileges, including the protections that would shield Singleton's conversations with counsel from discovery. Singleton, in his obstruction at least, apparently acted alone and he was not alleged to have been a high-ranking executive of the company privy to whatever arrangements the lawyers were making with prosecutors regarding corporate cooperation or waivers. In this respect, the government's theory in *Singleton* is obviously more extreme than the charges levied in *Computer Associates*.

---

78. There is widespread agreement that corporate counsel, before interviewing corporate employees, *must* give what is commonly referred to as an "*Upjohn* warning." Although expressed in different ways and with varying degrees of completeness, the warning generally is as follows: (1) counsel represents the company—not the employee—and is interviewing the employee to gather information in order to provide legal advice to the company; (2) the interview is confidential and covered by the attorney-client privilege; (3) the privilege belongs to and is controlled by the company; (4) because the company—not the employee—owns the privilege, the company, but not the employee, may elect in the future to waive any privilege and provide information derived from the interview to third parties, including prosecutors or regulators. *See, e.g.*, Brown, *supra* note 2, at 938-39 ("[C]orporate counsel are duty bound to advise employees with regard to both the scope of the legal representation and the attorney-client privilege prior to conducting any sort of interview in connection with a corporate investigation."); Sheila Finnegan, *The First 72 Hours of a Government Investigation: A Guide to Identifying Issues and Avoiding Mistakes*, PRACTICING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 901, 928-29 (Nov. 2006) (describing the "*Upjohn* warning" and recommending its use); John A. Reding & Edward Han, *The Horns of a Dilemma: Coerced Waivers in the Name of "Cooperation,"* PRACTISING L. INST.: CORP. L. & PRAC. COURSE HANDBOOK SERIES 445, 454-55 (Sept. 2006) (same). *See generally* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 938-41 (2003) (discussing the advantages and disadvantages of the "*Upjohn*" warning).

79. Singleton Indictment, *supra* note 52, at 20.

80. *Id.* (emphasis added).

81. *Id.*

Although Kumar's and Richards' indictment also does not allege that they *knew* that CA had agreed to cooperate with the government *or* had agreed to waive applicable privileges in doing so, the facts that are alleged in the indictment permit an inference that such knowledge was readily available to the defendants who, after all, dominated the executive ranks of the company.[82] Certainly, the government, in responding to the defendants' motion to dismiss, contended that the top executives' obstruction conspiracy was *aimed* at misleading counsel who they knew, by virtue of the corporation's decision to cooperate fully, would in turn use counsel to persuade the government that no misconduct had occurred.[83] As noted above, the government's charging decision in *Computer Associates* was based on a broad range of obstructive activities—not just the lies to counsel—and seemed to be founded on a theory that the lies to counsel were merely part of a concerted conspiracy to deflect the government's inquiry.[84]

The *Singleton* prosecution is also more aggressive from a legal perspective because the obstruction charge was based exclusively on the defendant's misrepresentations to corporate counsel. Singleton's lawyers lodged the same objections in Texas as Kumar's and Richards' had in New York. The district court refused Singleton's invitation to dismiss the indictment on the ground that the indictment pled an insufficient "nexus" between Singleton's lies and an "official proceeding." Notably, the *Singleton* court, unlike the *Computer Associates* court, upheld the government's theory that lying to counsel—even where there is no allegation that the defendant *knew* that counsel would be turning over his statements to the government—could have the requisite causal nexus to obstruction of an "official proceeding" (the grand jury investigation):

> The Indictment . . . alleges facts indicating that the *outside attorneys were acting as an arm of the investigating agencies*, that the investigating agencies had formally requested information from El Paso, and that Singleton *believed* that his statements to the outside attorneys would be provided to the investigating federal agencies. The indictment alleges that Singleton supplied a written response to at least one federal agency's inquiry; that he met (accompanied by his criminal defense counsel) with El Paso's outside attorneys whom he knew were performing a detailed investigation in response to the governmental inquiries; and that he "*believed* that El Paso's Outside Lawyers would inform government agencies of his statements [made] during the interview," and that, in fact, the outside attorneys did so through a memorandum of interview. These allegations—in combination—are adequate to satisfy the requirement for an official proceeding, of which Singleton was aware. The allegations, if proved . . . , could raise the inference that Singleton *expected* and thus arguably intended that his intentionally false statements would be supplied to the

82. *See* Kumar Indictment, *supra* note 12.
83. *See* Government's Opposition, *supra* note 68.
84. *See* discussion *supra* Part I.3.

> Federal government in connection with one or more of these identified official proceedings.[85]

The district court's reasoning in *Singleton* is singular in light of what was *not* pleaded in the indictment. Close analysis of the indictment, including those allegations relied upon by the district court, reveals that at the bottom all that was alleged was that Singleton knew of the investigation, knew that counsel was trying to gather facts in part to respond to government inquiries, and, apparently because of the *Upjohn* warning, was aware that the statements he made *could* be shared with the government. *Upjohn* warnings are (or should) be given by corporate counsel to employees and agents prior to any interview. If a mere awareness that investigative results *could* be shared with the government sufficiently alleges a causal nexus, obstruction charges would seem to be possible in *every* case in which employees (after administration of the *Upjohn* warning) lie to corporate counsel during the course of an internal corporate investigation, regardless of whether the company has made a decision to cooperate or waive its privileges or has communicated that decision, if made, to its employees.

If, as *Aguilar* held, the defendant is required to "know" that his statement will be used in the "official proceeding" to satisfy the "nexus" requirement, then the *Singleton* court's holding seems quite suspect. One could rationalize its decision with the outcome of *Aguilar*, however, by focusing on the court's conceptualization of El Paso's lawyers' role as that of "an arm of government investigators."[86] Perhaps underlying the court's ruling is an assumption that employees today know and appreciate the consequences of this new role for corporate internal investigators—an assumption which seems fair given the recent attention paid in white-collar circles to the DOJ's cooperation policy. If this assumption is accepted, one could impute to employees knowledge that these "arms of the government" will share their statements, satisfying the requisite "nexus," again, in virtually every case.

This reasoning is borne out by the evidentiary basis upon which the district court eventually granted Singleton's motion for a judgment of acquittal on the obstruction count. Singleton, almost alone among those charged in the overall investigation, took his case to trial. At the conclusion of the government's case, Singleton argued that the government's evidence was insufficient to sustain a conviction on the obstruction count because (1) corporate counsel testified at trial that he was not "acting as an arm of the investigating agencies"; and (2) the government failed to present evidence that he believed that El Paso's outside counsel "would inform

---

85. United States v. Singleton, No. H-06-080, 2006 WL 1984467, at *6 (S.D. Tex. July 14, 2006) (citations omitted) (emphasis added).

86. *Id.*

government agencies of his statements during the interview."[87]

For purposes of giving defense lawyers a taste of what lies in store for them should the government continue to bring these types of prosecutions, it is worth reproducing the testimony elicited on the cross-examination conducted by Paul Nugent, of Foreman, DeGeurin & Nugent, of *government witness*, David McAtee, the lead lawyer for El Paso's outside counsel, Haynes & Boone:

> Q. You weren't an investigating arm of the federal government?
> A. No, we were not.
> Q. You weren't an investigating arm of any federal agency?
> A. No.
> Q. You certainly weren't an investigating arm of [prosecuting Assistant U.S. Attorney] Mr. Lewis or the U.S. Attorney's Office. Right?
> A. No. We were not.
> Q. You didn't know who Mr. Lewis was in November 2002, probably?
> A. No. I did not.
> Q. And when you met with Mr. Singleton and when you and your team met with the other 20 or 30 people you made sure to tell them that you represented El Paso Corporation. Right?
> A. Correct.
> Q. What the employee said would be told to upper management of El Paso. Right?
> A. Right.
> Q. And you may or may not share what was said with third parties, including government agencies. Right?
> A. We told them that the company would make that decision.
> Q. Right. It may happen or it may not happen. Right?
> A. Correct.
> Q. But you did tell them whatever the employee said would be shared with the company?
> A. Yes, we did.
> Q. So, these 20 or 30 employees were all told by you—or by whoever was present in the interview, of course, if you weren't there—that what they said would be told to their upper management and it may or may not, down the road, be told to other people?
> A. That's correct.
> Q. And, of course, in November of 2002, you and your team had not made any decision or El Paso had not made a decision where the information was going to go. Right?
> A. Not that I knew of.[88]
> . . .
> Q. You didn't tell Mr. Singleton you were going to prepare a memo

87. Defendant Greg Singleton's Motion for Judgement [*sic*] of Acquittal as to Count Ten ¶¶ 1-2, United States v. Singleton, No. H-06-080 (S.D. Tex. July 31, 2006).

88. *Id.* ¶ 3 (quoting McAtee Trial Testimony).

[memorializing the statements Singleton made during his interview with counsel]. Right?

A. We did not.

Q. And, of course, you didn't have Mr. Singleton or his lawyer participate in the drafting of this memo [which was eventually provided by counsel to the CFTC, the FERC and the U.S. Attorneys Office]?

A. No.[89]

The trial judge granted the defense's motion without written opinion and dismissed the obstruction count.[90] Of the eight counts submitted to the jury, Singleton was convicted on one count of wire fraud, found not guilty on four counts, and the jury hung on the remaining three charges.[91]

It is always perilous to read the tea leaves of a jury verdict, but since I have been speculating wildly on what went on in other "black boxes" (like the DOJ and the relevant defense camps), I will try. It does not seem irrational to suggest, based on these results, that the government may have brought the obstruction charge to give somewhat borderline substantive charges a little help in the form of evidence of the defendant's purported "consciousness of guilt."

One could argue that the CA prosecution, given the government's apparent belief that the senior management of CA was engaged in a conspiracy to obstruct, only part of which involved lies to counsel, was a righteous case that should not threaten the defense bar because presumably such conspiracies are rare or will often be discovered before much time has elapsed. The *Singleton* obstruction case, by contrast, seems a real and unworthy stretch, but the government *lost* on that count. Perhaps, then, the DOJ might avoid any unfortunate repercussions of its charging choices in *Computer Associates* and *Singleton* by simply restricting this theory to what it conceives of as compelling cases of concerted obstruction at the highest levels of a company that include, *but are not limited to*, intentional uses of defense counsel as an innocent conduit of false information.

I don't think the distinction is possible, principally because the defense bar has not, in digesting these precedents, drawn this distinction and is unlikely to do so in future. It is extraordinary that, given the equivocal message in *Computer Associates* and the government's loss of this charge in *Singleton*, the defense bar continues to buzz about these prosecutions. The mere fact that this theory was aggressively advanced and defended by the government ultimately accounts for the notoriety of these cases. What the bar has taken away from the CA executives' obstruction cases are not the details of the government's theory or even the results of the cases, but rather the headlines—"*Private Lies May Lead to Prosecution: DOJ Views False Statements to Private Attorney Investigators as a Form of*

89. *Id.* ¶ 4 (quoting McAtee Trial Testimony).

90. Hearing Minutes and Order, United States v. Singleton, No. H-06-080 (S.D. Tex. July 31, 2006) (granting Singleton's Motion for Judgment of Acquittal as to Count Ten and dismissing Count Ten).

91. Verdict Form at 1-2, United States v. Singleton, No. H-06-080 (S.D. Tex. Aug. 4, 2006) (jury verdict).

Obstruction of Justice"[92]—and the perceived bottom line—"Until [the *Computer Associates* cases], lying to your own company's lawyers was not a crime. Now it is."[93] That this message was sent and received is important because it is has impacted white-collar practitioners' thinking on how to conduct internal investigations—although not perhaps in the way the DOJ intended.

III. KILLING THE GOLDEN GOOSE?

The role of the lawyers for a corporation in representing clients accused of criminal wrongdoing has long presented many very difficult challenges; the *Computer Associates* and *Singleton* prosecutions, however, make their jobs a singular nightmare. Corporate counsel have lived with the idea that their duty, if their client decides to cooperate with government investigators, is to vivisect the entity to please the government. Now, however, they may well be the star witnesses in prosecutions of corporate executives charged with obstruction for lying to them.

For example, if Kumar's and Richards' cases had gone to trial, observers would have been treated to the specter of lawyers from Wachtell, Lipton, Rosen & Katz and Sullivan & Cromwell LLP providing the foundation for the obstruction charge by testifying for the government regarding the false statements made to them by Kumar and Richards. Lawyers from Davis Polk & Wardwell (representing Kumar) and Skadden, Arps, Slate, Meagher & Flom LLP (representing Richards) would be waiting in the wings to attempt to draw from their peers favorable testimony relating to the government's alleged nexus (as in the colloquy quoted above) and then to subject them to a bloody cross to discredit their testimony regarding false statements allegedly made. I believe it fair to say that many practitioners would rather open a vein than be put in a position where their every move in the conduct of their representation of the corporation, not to mention their credibility, will be vigorously second-guessed on cross-examination by other members of the white-collar bar.

Given my thesis, however, our focus must be on what these prosecutions portend for the government's primary mission—effectively and efficiently to uncover and address corporate criminality. It is my belief that the government is shooting itself in the foot in these prosecutions because they threaten, in at least two respects, the very information pipeline that the government seeks to pump through its cooperation policy.

A. Additional Protections for Executives

White-collar lawyers are wrestling with two issues in the conduct of their internal investigations in response to the CA and *Singleton* cases. First, they are

---

92. Timothy P. Harkness & Darren LaVerne, *Private Lies May Lead to Prosecution: DOJ Views False Statements to Private Attorney Investigators as a Form of Obstruction of Justice*, 28 NAT'L L.J. 46, July 24, 2006.

93. Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. TIMES, May 17, 2004, at C1.

considering the necessity of augmenting the *Upjohn* warnings with an additional warning, sometimes called a "Zar Warning" in honor of one of the executives (Ira Zar) who pleaded guilty in the *Computer Associates* case.[94] Thus, at least some counsel, in some cases, now warn employees not only that the information provided during the interview may be turned over to the government, *but also that the witnesses may be exposed to possible obstruction charges if their statements are not truthful.*[95] White-collar practitioners recognize, of course, that "giving such a warning may have a chilling effect and cause employees to decline to provide information."[96]

A second, and potentially more serious, inhibiting circumstance arising from these obstruction cases relates to the perennial question of separate representation. At least where an employee's status (i.e., witness, subject, or target) in the investigation is unclear, as it often is at the early stages when employees are first interviewed, the corporation's lawyers may be reluctant to jointly represent employees or to enter into joint defense agreements with them. But these employees are faced with critical questions, the answer to which may have very serious personal consequences: Should they claim their Fifth Amendment right or speak with the company's lawyers? Should they cooperate with the investigation, or risk losing their jobs? Do they need their own lawyer? Employees generally turn to corporate counsel for answers, but counsel for the corporation cannot give legal advice to non-clients whose interests may eventually diverge from that of the entity.[97]

Corporate counsel, then, must decide whether and when to suggest separate counsel for employees. Lately, lawyers for the corporation have increasingly concluded that, "in light of the possibility that a criminal conviction can be based solely on the interview of a company employee by the company's private lawyer, independent legal representation for at least key employees should be considered early in the investigation."[98] Again, counsel are considering this course despite their understanding that "[a] represented employee may be less likely to cooperate with the investigation or volunteer fewer facts that the company could in turn pass onto the government in the course of its investigation."[99]

Corporate counsel have a duty of loyalty only to the entity,[100] which needs the

---

94. *See, e.g.*, Finnegan, *supra* note 78, at 929-30 (describing the "Zar Warning"); *see also* Daniel H. Bookin, et al., *Obstruction of Justice Under Computer Associates: Legal, Tactical and Ethical Implications for Attorneys Conducting Internal Investigations*, PRACTISING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 259, 277-78 (Aug. 2006) (same).

95. Finnegan, *supra* note 78, at 930.

96. *Id.*

97. *See, e.g.*, *id.* at 929; *see generally* Duggin, *supra* note 78, *passim.*

98. Finnegan, *supra* note 78, at 930.

99. *Id.*

100. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2007) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

information that a Zar warning or early provision of separate counsel may inhibit employees from sharing. Given that the corporation's lawyers must pursue the corporation's interests even at the expense of corporate constituencies, including employees who may be indicted under a *Computer Associates/Singleton* theory down the line, why might counsel conclude that additional warnings or the provision of counsel are wise or appropriate?

The answer lies in a closer examination of where the corporation's true interests lie in these circumstances. *Computer Associates* is a grand example of how a case that otherwise might have been contestable was sunk by the executives' obstructive activity. We don't know what happened in *Singleton*, but it seems to be a prosecution in which the government hoped, ultimately (largely) unsuccessfully, that this would be the case. In short, if executives lie, and corporate counsel unwittingly pass on those lies to the government, not only is any cooperation deal/declination gravely endangered, but the existence of obstruction makes much more difficult—if not impossible—defense of the balance of the allegations. Further, under respondeat superior principles, the corporation could be criminally liable for the obstructive activity of its deceptive agents, even though the obstruction charged concerns bamboozling the corporation itself. Presumably it is only due to the evident zeal of Sullivan & Cromwells' lead lawyer, Robert Giuffra, in responding to prosecutorial requests, notably offering his team a bounty for nailing his client's CEO, that he managed the signal victory of earning CA a DP rather than a criminal conviction.

Corporate counsel, then, may not be concerned that early provision of separate counsel and Zar warnings inhibit employees' communication with counsel—*if* the communications avoided are likely to be deceptive. In light of the dynamic outlined above, they want to make sure that they get and pass on only reliable information. Where a witness has separate counsel, that lawyer will often strongly urge any individual subject or target to remain silent. If the witness elects to speak, usually for fear of being fired if he doesn't, the lawyer will prepare the witness within an inch of his life to ensure (in light of these cases) that the witness does not exacerbate his own exposure through obstruction. In short, obtaining separate counsel for the witness early on may go a long way toward ensuring that the witness either tells the truth or takes the Fifth. Zar warnings are designed to achieve similar ends. A witness who hears that deceiving the corporation's lawyers may carry with it a criminal sentence is much more likely to take the Fifth Amendment rather than lie, even if it means termination of the witness's employment.

The government, no doubt, would respond that it, too, has no interest in being misled or distracted with false witness statements; to the extent that these prosecutions deter witnesses from communicating such lies, then, it is not concerned that this particular "pipeline" of information has been plugged. My supposition, however, is that these responses to the CA and *Singleton* prosecutions may significantly *overdeter*. *Upjohn* warnings inform employees that, should their

interests diverge from those of their employer, they may be kicked to the curb; the Zar warnings go a step further, strongly implying that speaking to counsel is tantamount to speaking to the government. Having received a Zar warning, corporate employees cannot conceivably be in any doubt about corporate counsel's role. What counsel is essentially saying is that they may serve up witness' false statements to the government for prosecution. The reasonable witness in such circumstances—even if he or she has no real exposure—will be much more circumspect in answering questions than formerly, particularly if he or she is represented. Witnesses will legitimately be concerned that speculation, mistakes, or inadvertent misstatements will subject them to penal sanction, and that cannot help but have a severely inhibiting effect.

Counsel recognize the potential that these steps present for overdeterence—which is why the white-collar bar is struggling with these issues, dealing with them on a case-by-case basis, and has yet, as I understand it, to have moved toward a consensus policy. It is important to note that the considerations relevant to corporate lawyers' resolution of this issue will not be confined to the question whether these practices may deny them access to truthful information that they otherwise would have and need. One aspect of this equation is a consideration that I have not yet mentioned but which is of great (if unquantifiable) concern to those conducting internal investigations: the question of the effect of the internal investigation—and *how it is conducted*—on employee morale and their trust in and loyalty to the entity. The corporation and its lawyers must treat employees fairly in conducting these interviews or the fall-out in terms of these intangibles may be severe. Accordingly, corporate counsel *will* to some extent have to consider whether it is "only fair" to employees to warn them about their peril, and to provide them separate counsel at an early stage, in order to promote these other values of importance to their client. In short, given the corporation's interests at this stage—not all of which are shared by the government—it may well be that Zar warnings and early provision of separate counsel become the norm in corporate internal investigations, even if they threaten to reduce the flow of credible information of value to investigators.

B. State Action

Finally, there is the question of whether corporate counsel, if they truly are "deputies" of the government, need to abide by constitutional strictures in conducting their investigations. Of course, the guarantees of the Bill of Rights constrain only state, not private, actors. Where, however, private actors' conduct is "fairly attributable" to the federal government, they may be held to the same constitutional standards as federal agents.[101] To attribute private action to the

101. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (outlining when an action is "fairly attributable to the State"). Note that U.S. constitutional issues may not be the only consequence of a finding that private corporate counsel are effectively acting as an arm of the U.S. government when the internal investigation concerns a multinational corporation or cross-border conduct. For example, if corporate counsel attempt to

State, two criteria must be satisfied:

1. "the complaining party must . . . show that there is a *sufficiently close nexus between the State and the challenged action*. . . . [C]onstitutional standards are invoked only when it can be said that the State is [responsible] for the *specific conduct* of which the plaintiff complains."[102]
2. A State normally can be held responsible for a private decision only when it "*has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State*. Mere approval . . . is not sufficient to justify holding the State responsible for those initiatives."[103]

It is striking that the language of this test—examining the "nexus" between the exercise of governmental coercion or encouragement and private action—parallels that used in the obstruction context. The linguistic connection is no coincidence because the inquiry in both situations essentially poses the same question: is the nominally private person acting as an "arm of the government?" If the *government* takes the position that corporate counsel are indeed acting as the "deputies" of the federal government during internal corporate investigations, the conclusion that they are in fact state actors seems virtually inevitable. While this conclusion might implicate a number of constitutional provisions, for our purposes it is sufficient to focus on the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment obviously protects against direct governmental compulsion of incriminating testimony. Thus, for example, a prosecutor who wishes to force a witness to spill all in testimony before a grand jury—under threat that the witness will be jailed until he refuses to speak—cannot do so without first immunizing the witness. The privilege against self-incrimination, however, also applies to official practices that, while less obviously coercive, make the exercise of the privilege unduly "costly" and thus constitutionally "compelled" for Fifth Amendment purposes. In particular, the Supreme Court has held that testimony secured through governmental threats of serious economic consequences, such as the loss of government employment or state contracts, is "compelled" for Fifth Amendment purposes.[104] Where such compulsion has been applied, the appropri-

---

investigate—for example, by interviewing witnesses—abroad they may be deemed governmental actors and held criminally to account for violating the foreign nation's sovereignty or so-called "blocking statutes." *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 (1987); *see also* Bert H. Deixler & Damian J. Martinez, *Cross-Border Investigations,* at B(2)-(6), *available at* http://www.proskauerguide.com/litigation/4/II (discussing blocking statutes).

102. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphases added) (quotations omitted).

103. *Id.* at 1004-1005 (emphases added) (citations omitted); *see also* D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002) (applying the test outlined in *Blum*); Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 207 (2d Cir. 1999) (citing the *Blum* test).

104. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 77-78 (1973) (ruling that architects may not be forced to choose between self-incrimination and the loss of state contracts); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 284-85 (1968) (holding that public employees may not be forced to choose between

ate remedy is suppression of the ensuing statements.[105]

Again, this rule does not normally apply where the threatened consequences are imposed by private, as opposed to state, actors.[106] But what if the private actor—say a corporation that tells its employees that they must cooperate with the government or be fired—is deemed to be acting at the behest of the DOJ? One need look no farther the motion to suppress filed on this theory in *Computer Associates*[107] or Judge Kaplan's decision in *United States v. Stein*[108] to see that this is not far-fetched. In *Stein*, individual employees of KPMG argued that they were coerced into speaking to the government by KPMG's policy decreeing that the company would cease paying attorneys' fees to employees' individual defense attorneys if the employees refused to cooperate with the government. This corporate policy was instituted with the object of securing for KPMG credit for fulsome cooperation with the government and, accordingly, declination of criminal charges. In assessing whether KPMG's "coercive" action was attributable to the government for constitutional purposes, the court explained:

> [Defendants] point to the [McNulty Memo's predecessor, the] Thompson Memorandum, which quite specifically tells a company under investigation, as was KPMG, that a failure to ensure that its employees tell prosecutors what they know may contribute to a decision to indict and, in this case, likely destroy the company. And they point also to the [U.S. Attorney's Office's (USAO's)] close involvement in KPMG's decision making process by, among other things, pointedly reminding KPMG that it would consider the Thompson Memorandum in deciding whether to indict, saying that payment of employee legal fees would be viewed "under a microscope," and reporting to KPMG the identities of employees who refused to make statements in circumstances in

---

self-incrimination and discharge from employment); Garner v. Broderick, 392 U.S. 273, 279 (1968) (same); Spevack v. Klein, 385 U.S. 511, 518 (1967) (holding that attorney may not be disbarred for exercising his Fifth Amendment privilege); Garrity v. New Jersey, 385 U.S. 493, 497 (1967) (holding that police officers may not be forced to choose between self-incrimination and dismissal from the police force).

105. *See, e.g.*, *Garrity*, 385 U.S. at 500 (holding that testimony compelled by threatened loss of employment cannot be used in subsequent criminal prosecutions).

106. *See, e.g.*, *D.L. Cromwell*, 279 F.3d at 160 (ruling that NASD investigative unit was not acting as an agent of the federal government when it required brokers to provide evidence, thus precluding assertion of the privilege against self-incrimination); *Desiderio*, 191 F.3d at 207 (holding that NASD was not a state actor and its adoption of a rule requiring compulsory arbitration of employment disputes was not attributable to the government and therefore could not be attacked on Fifth Amendment Due Process, Seventh Amendment jury trial, and Article III grounds); United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975) (holding that interrogation of officer of a brokerage firm by the NYSE was not the equivalent of interrogation by the government and so the defendant's privilege against self-incrimination was not triggered); *cf.* United States v. Antonelli, 434 F.2d 335, 337–38 (2d Cir. 1970) (ruling that custodial interrogation by private security guards does not constitute state action).

107. Memorandum of Law in Support of Defendant Stephen Richards' Motion to Suppress His Coerced Statements to Sullivan & Cromwell and the Securities and Exchange Commission, United States v. Kumar, Cr. No. 04-846 (ILG) (Feb. 17, 2006).

108. 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

> which the USAO knew full well that KPMG would pressure them to talk to prosecutors.[109]

Accordingly, Judge Kaplan ruled that:

> [T]he government, both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights. There is a clear nexus between the government 'and the *specific* conduct of which' the defendants were complaining.[110]

Having found that KMPG's actions in this regard were "fairly attributable" to the government, the court ruled that "the coerced statements and their fruits must be suppressed."[111]

As Professor Sam Buell has discussed at length, the degree of coercive force applied by governmental policy, or the causal nexus between governmental policy and private coercion required to demonstrate the requisite state action, is an "exceedingly hard line[] to draw."[112] The government has made that line a whole lot easier to discern by bringing the above-described obstruction cases. Indeed, Judge Kaplan cited the CA obstruction prosecution in the *Stein* case, noting that "[t]here is more than a little tension between [the government's] assertion that the acts of companies cooperating with it are not state action when the cooperator is induced to coerce third parties for the government's benefit but are sufficiently related to government action that obstruction of the cooperator obstructs the government."[113] Where private counsel is, *according to the DOJ's own theory*, acting as an "arm" of the government, it is the difficult to understand how the DOJ can, at the same time, credibly contend that the corporation's coercive activity is not the product of state action.

CONCLUSION

Although the *Computer Associates* and *Singleton* obstruction theories are a natural outgrowth of the government's conception of the proper role of corporations and corporate counsel when allegations of wrongdoing arise, these precedents are likely to be exceedingly counterproductive in the long run. Defense counsel, whose clients' interests are *not* in fact completely aligned with the government, are already considering altering their investigative practices in response to these prosecutions in ways that threaten to deprive the government of truthful information. Courts are unlikely to be sympathetic to prosecutorial efforts

---

109. *Id.* at 336-37. Note that the DOJ has changed its policy with respect to requests for fee cut-offs in the newest iteration of the Holder/Thompson policy. *See McNulty Memo*, *supra* note 1.

110. *Stein*, 440 F. Supp. 2d. at 337.

111. *Id.* at 337-38.

112. Samuel W. Buell, *Criminal Procedure Within The Firm*, 59 STAN. L. REV. 1613, 1641 (2007).

113. *Stein*, 440 F. Supp. 2d at 337 n.114.

to "deputize" corporate counsel for purposes of facilitating its investigation with counsel's work product, while at the same time seeking to disclaim any responsibility for the coercion brought to bear by their "deputies," at the behest of government policy, on individual employees to forswear their rights. If, as I have speculated, these charges are being used to bolster tough-to-win or marginal cases, the public interest may well be served by letting the principal charges in such prosecutions stand or fall on their own. Certainly foreswearing this theory, while disappointing for individual assistant U.S. attorneys, will promote the greater good defined in the Department's cooperation policy.